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INTRODUCTION TO NEW MEXICO WATER HISTORY AND TERMINOLOGY

SUMMARY

This bulletin discusses New Mexico water history and selected terminology used when water issues are debated and studied. The terminology presented may be found in the state constitution and statutes, federal law, case law and regulations.

ISSUES AND CONCERNS

New Mexico has limited water resources. The situation is aggravated by serious drought conditions, compelling policymakers to address questions about water resources and rights, planning and usage, conservation and adjudications. When considering questions about water policy, it is helpful to be familiar with terminology and history. Due to the complexity of the water laws and issues, it is recommended that readers consult cited and other sources for additional information about water history, laws, rights and current issues.

STATE ADMINISTRATIVE AGENCIES

The state engineer and the Interstate Stream Commission are the state agencies charged with management of the waters in New Mexico. The Office of the State Engineer (SEO) evolved from the Office of the Territorial Irrigation Engineer, created in 1905. The state engineer supervises the waters of the state, including their measurement, appropriation, distribution, apportionment and adjudications by the courts (Sections 72-2-1 and 72-2-9 NMSA 1978). The Interstate Stream Commission (ISC), for which the state engineer serves as secretary and as its ninth member, is responsible for the negotiation of compacts for interstate streams. The commission is authorized to match appropriations made by Congress to investigate development of interstate streams; and it is authorized "to investigate [the] water supply, to develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of this state, interstate or otherwise" (Section 72-14-3 NMSA 1978). The ISC was created in 1935.

State agencies that are responsible for other aspects of water administration and project funding include the Energy, Minerals and Natural Resources Department, the Department of Environment, the Department of Game and Fish, the New Mexico Department of Agriculture and the Water Trust Board. Additionally, various artesian conservancy, irrigation, conservancy and special districts are authorized to perform certain irrigation and conservancy functions (Chapter 73 NMSA 1978).

FEDERAL AGENCIES

Many federal agencies are involved to some extent in New Mexico's water management, the Bureau of Reclamation being the most notable. It was established before New Mexico's statehood (January 6, 1912) and is charged with providing and financing projects for large-scale irrigation systems, reservoirs, flood control and river regulation and new facility construction. New Mexico is required by Congressional action to recognize the authority of this agency. The Carlsbad Irrigation District, Middle Rio Grande Conservancy District and Elephant Butte Irrigation District are projects developed by the bureau.

The U.S. Army Corps of Engineers "operates seven major reservoirs in New Mexico" and "conducts planning and design studies for flood control" (Johnson and Shomaker, 2002, 43). The U.S. Fish and Wildlife Service analyzes the impacts of water on critical habitat designations, such as the silvery minnow in the Rio Grande, which is protected under the federal Endangered Species Act.

BRIEF HISTORY - PRIOR APPROPRIATION

New Mexico water use rights and practices predate statehood. The movement or diversion of *surface water flows* for floodwater farming were witnessed when the first Spaniards conducted explorations to the Indian pueblos along the Rio Grande in the late 1500s (Clark, 1987, 7). In the following years the influence of the Spaniards led to the construction of community ditch systems, commonly called *acequias*. Today,

there are approximately 800 community and ditch associations in New Mexico (State Engineer, July 2001), and they are political subdivisions of the state exercising powers granted by the legislature (Section 73-2-28 NMSA 1978).

The Spaniards inherited the acequia system from the Moors. The rural communities of Spain were given certain controls over their lands and waters in outlying areas, and this concept was carried to New Mexico, where the Spanish and indigenous populations bore the responsibility for the apportionment of water in equitable shares to members of the community (Clark 1987, 10-15).

The territorial laws, written in the late 1800s and later adopted by this state through its constitution and statutes, were based on Western mining laws and embraced the concept of "*prior appropriation*". Miners who staked claims needed water diverted for their beneficial use, and with that need came the question of how to determine rights to the stream flow diversions. Since title to mining claims was based on "*first in time, first in right*", the same was applied to the appropriation of water, resulting in the *prior appropriation doctrine* (Clark 1987, 38). The *prior appropriation doctrine* provides that the person using the water with the first or more *senior right* has a *better right* than a subsequent user, so long as the beneficial use continues.

This doctrine rejected both *equitable apportionment* of water and the commonly known *riparian rights*, which give an automatic right to use water from natural sources on or next to a landowner's property, including the right to have the natural flow continue.

BENEFICIAL USE

Article 16 of the New Mexico Constitution provides that the "unappropriated water of every natural stream, perennial or torrential" within New Mexico belongs to the public and is subject to appropriation for *beneficial use*. A property right for surface or ground water is actually a use right to "beneficial use" of the water, not to ownership of it. The constitution further reads that "priority of appropriation shall give the better right". Through the years, *beneficial use* has been construed to include use for irrigation (agricultural purposes), domestic, commercial and industrial purposes. As specified in Section 72-1-2 NMSA 1978 and the underground water provision, Section 72-12-2 NMSA

1978, "beneficial use is the basis, the measure and the limit to the right to the use of the waters".

There are practical limitations to the full application of prior appropriation laws, in part because of enforcement issues and the need to adjudicate water rights, and because ground water pumping often impacts surface flows and water rights users, many of whom hold senior rights. (See Water Rights section below.) It may take months or years to eliminate the effects on the surface flows caused by the pumping. If wells continue to be drilled and existing water rights are not retired, then the state may be overstating the true availability of waters for appropriation, resulting in over-appropriation and deprivation of water rights primarily for those with senior rights.

A water right has a *priority date* attached to it, which identifies when the right was first initiated. The priority date is used to determine which right is more or less senior in times of water shortages. If a *priority call* were to be made during a water shortage, theoretically a senior water rights holder should receive his water before a junior holder. It has been reported that only "two instances" of requested priority calls have "resulted in action—both during the 1996 drought" (Belin, Bokum, and Titus, 2002, 15). This is a critical issue, because the state may soon have to make priority calls to meet its obligations to deliver water under the provisions of interstate water compacts (e.g., the Pecos River Compact) and additional court orders involving the federal Endangered Species Act (e.g., the case of the silvery minnow).

Interstate compacts are statutorily authorized and approved agreements for apportioning the waters of interstate rivers. The agreements became effective after they were approved by all of the participating states and Congress. These compacts specifically limit how much water can be used in New Mexico and require the flow of waters to downstream users. Interstate compacts are governed by federal law (LCS, 1999, 8). New Mexico has *eight interstate compacts* found in Chapter 72, Article 15 NMSA 1978: the *Pecos River Compact, Rio Grande Compact, Animas-La Plata Project Compact, La Plata River Compact, Canadian River Compact, Colorado River Compact, Costilla Creek Compact and the Upper Colorado River Basin Compact*.

Statutory provisions call for the *forfeiture of unused water rights* when they have not been put to beneficial

use for a period of four years (Sections 72-5-28 and 72-12-8 NMSA 1978). These statutes allow certain exemptions to the forfeiture provisions, including water rights placed in state engineer-approved conservation programs, water held by municipalities and counties in accordance with the 40-year planning statutes and certain specified or approved water banks. Water rights may be lost by abandonment, when the owner intentionally discontinues using all or part of the water. Abandonment has been used in water rights adjudications and has evolved through common law.

Waste of water is not considered a beneficial use; thus it could lead to forfeiture of water rights, if the beneficial use has ceased. Additionally, waste of water could potentially result in criminal sanctions (Section 72-8-4 NMSA 1978). Since 1965, the law requires a one-year notice to the nonuser by the state engineer prior to the actual forfeiture, and the state engineer may authorize extensions with a proper showing of reasonable cause for nonuse. Once forfeited, the unused water reverts to the public as unappropriated public water. On a practical basis, forfeiture appears to be a tool with limited use.

Section 72-2-18 NMSA 1978 was enacted in 2001 authorizing the state engineer to issue compliance orders; to impose civil penalties and seek repayment for costs of water; and to seek injunctive relief for permit and license violations, the **overdiversion** or illegal **diversion** of water and other violations of water laws and regulations. The **diversion or withdrawal** of water refers to the quantity of water taken from a ground or surface water source.

WATER RIGHTS

A limited state water code was first enacted in 1905 and legislated the **appropriation of surface waters**; it was replaced in 1907 with the code in use today. New Mexico constitutional provisions recognize existing **pre-March 19, 1907 (surface) water rights**; however, many have not been adjudicated or quantified.

Ground water laws were not adopted until 1931, at which time **underground waters** were declared to be public and subject to appropriation for beneficial use. They generally parallel the surface water statutes; specific differences are not detailed in this bulletin.

In general, states have the right to adjudicate state and federal water rights within their boundaries. **Federally**

reserved water rights are those on lands reserved by Congress or the president (e.g., national parks and forests, wildlife refuges, wilderness areas, military bases and tribal reservations). The federal government will be a party to an adjudication, if there are federally reserved rights involved. The priority date for these reserved rights is generally considered to be the date the land was reserved. According to the **Winters Doctrine** (Winters v. U.S., 207 U.S. 564, 28S.Ct. 207, 52 L.Ed. 340 1908), the **reserved water rights doctrine** applies to certain tribal reservations created by Congress; most Indian water rights are considered to be federally reserved rights. Generally, pueblo rights are not reserved under the Winters Doctrine; rather, they have an aboriginal right to the use of water recognized under the laws of Spain and Mexico and, subsequently, by the United States through the Treaty of Guadalupe Hidalgo. These prior rights are limited based on various court decisions and methods of quantification. The priority date for the latter has been argued to be senior to that of all other users. Indian water rights are very complex and addressed on a case-by-case basis; hence, they are not detailed in this introductory bulletin.

Adjudication of water rights is the legal process for **establishing a right** to use certain waters, determining a priority date and quantifying the extent of the water right. Until the "pre-1907" rights are adjudicated, they are given seniority, whereas applications for rights or adjudicated rights filed subsequent to March 19, 1907 are subject to the senior rights. The state engineer may institute the adjudication process; however, a legal action for determining a water right may be brought to court by individuals as well.

It is the duty of the state engineer to "make hydrographic surveys and investigations of each stream system and source of water supply in the state...for the determination, development and adjudication of [the] water supply of the state" (Section 72-4-13 NMSA 1978). **Hydrographic surveys** involve the collection of data about stream systems and underground water basins and the mapping of the systems and diversions. Formerly, it took as long as 20 years to complete these surveys, yet with improved technology, the time can be reduced to three years (Turney, July 23, 2001, 14). In August 2001, the state engineer reported that "less than 15 percent" of the state's agricultural waters had been adjudicated in the last 100 years, making it difficult to enforce a priority

appropriation system rooted in a determination of first or senior rights.

Adjudicated water rights are administered by the state engineer, and it is necessary to have a permit from the state engineer if a water right originated after March 19, 1907. The statutes provide for the appropriation of unappropriated water through a permit application process. The state engineer is charged with the issuance of permits for these appropriations before any withdrawals may be made.

The state engineer may issue special orders defining the declared boundaries of underground streams, channels, artesian basins, reservoirs or lakes as provided in Section 72-2-8 NMSA 1978. These areas, known as **declared basins**, are under the jurisdiction of the state engineer for purposes of permitting water rights. Most of the state has declared basins, although there are regions in which underground basins remain undeclared. Permits and licenses are not required to pump water from undeclared basins; however, those areas are relatively few in number.

The application process for a **domestic well** is less stringent than for other types of wells. Domestic wells are used for domestic use and irrigation not to exceed one acre of noncommercial trees, lawn or garden. The law **mandates the issuance of the permit** by the state engineer after he determines that the applicant has complied with the specified requirements for the domestic well and that the applicant is in compliance with any applicable municipal ordinances. (For additional requirements pertaining to domestic well applications, see Section 72-12-1 NMSA 1978.) As reported by the state engineer, approximately 140,000 domestic well permits have been issued (Turney, April 3, 2002).

The process for acquiring rights for other uses of surface and ground water are more complex and involve the production of hydrographic surveys and investigations of water supplies, stream systems and historical usage (Chapter 72, Article 4 NMSA 1978).

In New Mexico the adjudication of water rights has been delayed due to historical public policy choices, shortages in resources to conduct the adjudications and antiquated or inefficient procedures in water administration. There are tremendous pressures to expedite adjudications of all water rights, as has been accomplished in many Western states, although the

magnitude of the task calls for millions of dollars to fund these activities, and years to process them through the court system. Although the automation of water rights records has been progressing, it will take years to complete. Adjudications of water rights will take decades to complete. The general counsel for the Office of the State Engineer, who is also director for the litigation and adjudication program, reports that he is working on a comprehensive plan for pending and future adjudications, which will be a component of the agency's strategic plan.

PERTINENT LAWS & RESOURCES

Article XVI, Sections 1-5 of the Constitution of New Mexico
 Chapters 72 and 73 NMSA 1978
 Rules of the State Engineer
 Federal Laws and Treaties
 Federal, Territorial and State Case Law

REFERENCE LIST

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In addition to other noted sources, this document contains information obtained from Jon Boller and excerpts from the report presented to the 1998 legislative interim Water and Natural Resources Committee, which was prepared by Gordon Meeks, Jr., and condensed in this bulletin by Roxanne Knight. For more information, contact the Legislative Council Service at (505) 986-4600. This document does not represent a policy statement of the Legislative Council Service or its staff.

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